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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Robert Joseph Benge,
10 Plaintiff,

11 v.

12 Charles L. Ryan, et al.,
13
14 Defendants.
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No. CV 18-02544-PHX-MTL (CDB)

ORDER

16 On August 9, 2018, Plaintiff Robert Joseph Benge, who was then confined in the
17 Arizona State Prison Complex (ASPC)-Florence, filed a pro se civil rights Complaint
18 pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act. In an October 19,
19 2018 Order, the Court dismissed the Complaint because it failed to state a claim and gave
20 Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the
21 Court's Order. Plaintiff subsequently sought a 30-day extension of the deadline to file an
22 amended complaint, and in a December 7, 2018 Order, the Court granted his request for an
23 extension of time. Plaintiff failed to file an amended complaint within 30 days, however,
24 and on January 23, 2019, the Clerk of Court entered Judgment dismissing this action with
25 prejudice.

26 On February 4, 2019, Plaintiff filed a Motion for Reconsideration. In a February
27 15, 2019 Order, the Court construed Plaintiff's Motion for Reconsideration as a Motion to
28 Vacate Judgment and for Extension of Time. The Court granted the Motion insofar as it

1 directed the Clerk of Court to vacate the January 23, 2019 Judgment and reopen this action
2 and gave Plaintiff 20 days to file an amended complaint. After seeking another extension
3 of time, Plaintiff filed a First Amended Complaint on March 20, 2019. In a June 7, 2019
4 Order, the Court granted Plaintiff's Motion for Extension of Time, dismissed the First
5 Amended Complaint, and gave him 30 days to file a second amended complaint.

6 On July 15, 2019, Plaintiff filed a Second Amended Complaint (Doc. 17). On
7 August 29, 2019, Magistrate Judge Camille D. Bibles issued an Order noting that Plaintiff
8 appeared to have been released from prison on August 9, 2019, yet had not filed a notice
9 of change of address. The Magistrate Judge ordered Plaintiff to show cause, on or before
10 September 27, 2019, why this action should not be dismissed for failure to comply with
11 the Court's October 19, 2018 Order, which expressly required Plaintiff to file a notice of
12 change of address and, within 30 days of his release, either (1) notify the Court that he
13 intended to pay the unpaid balance of his filing fee or (2) file a non-prisoner application to
14 proceed in forma pauperis.

15 On September 23, 2019, Plaintiff filed a Notice of Change of Address identifying
16 his new address. He did not notify the Court of his intention to pay the balance of the filing
17 fee or file a non-prisoner application to proceed in forma pauperis. On October 18, 2019,
18 the Magistrate Judge issued a Report and Recommendation recommending that this matter
19 be dismissed without prejudice for failure to comply with the Court's Orders.

20 On November 4, 2019, Plaintiff filed an Application to Proceed In District Court
21 Without Prepaying Fees (Doc. 24). In a December 17, 2019 Order, the Court accepted the
22 Magistrate Judge's Report and Recommendation after noting that Plaintiff had failed to
23 object to the Report and Recommendation or provide any explanation for his failure to
24 comply with the Court's prior Orders. Judgment was entered the same day.

25 On January 9, 2020, Plaintiff filed a Motion for Reconsideration (Doc. 27). The
26 Court will grant the Motion, will instruct the Clerk of Court to vacate the December 17,
27 2019 Judgment, and will dismiss the Second Amended Complaint and this action.

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1 **I. Motion for Reconsideration**

2 The Court will construe Plaintiff’s pending Motion as a motion filed pursuant to
3 either Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. *See Fuller v. M.G.*
4 *Jewelry*, 950 F.2d 1437, 1441-42 (9th Cir. 1991) (motion to reconsider can be construed
5 as Rule 60 or Rule 59 motion even when movant cites no governing Federal Rule of Civil
6 Procedure). It is within the Court’s discretion to grant or deny a motion for reconsideration
7 filed under Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. *School Dist.*
8 *No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993).
9 Reconsideration is appropriate under Rule 59(e) “if the district court (1) is presented with
10 newly discovered evidence, (2) committed clear error or the initial decision was manifestly
11 unjust, or (3) if there is an intervening change in controlling law.” *Id.* at 1263. “Rule 60(b)
12 ‘provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable
13 neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or
14 discharged judgment; or (6) ‘extraordinary circumstances’ which would justify relief.” *Id.*
15 (quoting *Fuller*, 950 F.2d at 1442); *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir.
16 1985).

17 In his Motion for Reconsideration, Plaintiff alleges that he did, in fact, submit an
18 objection to the Magistrate Judge’s Report and Recommendation and that it was contained
19 “within the same priority mail envelope” as his November 4, 2019 Application to Proceed.
20 He also claims it is “more probabl[e] than not” that he filed an objection to the Magistrate
21 Judge’s Report and Recommendation, because he filed a similar objection to a report and
22 recommendation issued in CV 18-00349. Plaintiff posits that the Clerk of Court may have
23 “inadvertently filed the objections to this case [in] . . . 18cv-00349-PHX-MTL (CDB).”¹

24 This is not the first time Plaintiff has been unable to recall with certainty whether
25 he filed a document. His February 4, 2019 Motion for Reconsideration contained similarly

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27 ¹ This does not appear to be the case. The docket for CV 18-00349 reveals that on
28 November 1, 2019, Plaintiff filed an objection to a report and recommendation entered in
that action. (Doc. 78 in CV 18-00349.) That objection bears the case number “18-cv-
00349-MTL (CDB),” *id.*, and it is the only document titled “Objection to Report and
Recommendation” that appears on the docket for CV 18-00349.

1 vague representations concerning a motion for extension that he had “more probably than
2 not” submitted to prison officials for filing on January 3, 2019. In an abundance of caution,
3 however, the Court will deem the Objection, which Plaintiff has attached to his Motion,
4 timely filed, and will consider the arguments raised therein in connection with his Motion
5 for Reconsideration.

6 Plaintiff states in his Objection that he believed he had 120 days from his release to
7 file a non-prisoner in forma pauperis application. He also attributes his failure to comply
8 with the Court’s Orders to (1) his homelessness following his release from prison; (2) his
9 subsequent relocation to North Carolina; and (3) his inability to obtain certain medications,
10 including mental health medications, following his move out of state. In light of these
11 factors, the Court will grant the Motion for Reconsideration and will direct the Clerk of
12 Court to vacate the December 17, 2019 Judgment.

13 **II. Application to Proceed in District Court Without Prepaying Fees or Costs**

14 Plaintiff’s non-prisoner Application to Proceed In District Court Without Prepaying
15 Fees or Costs indicates that he is unable to prepay the filing fees for this action. The
16 Application will therefore be granted.

17 **III. Statutory Screening of Prisoner Complaints**

18 The Court is required to screen complaints brought by prisoners seeking relief
19 against a governmental entity or an officer or an employee of a governmental entity. 28
20 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
21 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
22 relief may be granted, or that seek monetary relief from a defendant who is immune from
23 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

24 A pleading must contain a “short and plain statement of the claim *showing* that the
25 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
26 not demand detailed factual allegations, “it demands more than an unadorned, the-
27 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
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1 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
2 conclusory statements, do not suffice.” *Id.*

3 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
4 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
5 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
6 that allows the court to draw the reasonable inference that the defendant is liable for the
7 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
8 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
9 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
10 allegations may be consistent with a constitutional claim, a court must assess whether there
11 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

12 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
13 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
14 (9th Cir. 2010). A “complaint [filed by a pro se prisoner] ‘must be held to less stringent
15 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
16 U.S. 89, 94 (2007) (per curiam)).

17 **IV. Second Amended Complaint**

18 In his four-count Second Amended Complaint, Plaintiff asserts claims under the
19 Eighth Amendment’s Cruel and Unusual Punishment Clause, the Fourteenth Amendment’s
20 Equal Protection Clause, and the Americans with Disabilities Act (ADA). He names as
21 Defendants former Arizona Department of Corrections (ADC) Director Charles L. Ryan,
22 Health Care Director Richard Pratt, ADC medical contractor Corizon Health, LLC
23 (“Corizon”), Physician Assistant Carey Tucker, Psychiatrist Thomas Rawa, Psychologist
24 III N.V. Bertel, and Psychology Associate S. Mitchell. Plaintiff is seeking \$3.8 million in
25 compensatory and punitive damages, along with costs and attorney’s fees.

26 In **Count One**, Plaintiff asserts that he was denied adequate medical care following
27 a suicide attempt, in violation of his rights under the Eighth Amendment. (Doc. 17 at 5.)²

28 ² The citation refers to the document and page number generated by the Court’s

1 Plaintiff alleges that on April 17, 2014, he attempted to commit suicide by overdosing on
2 medication. (*Id.*) Plaintiff subsequently informed a correctional officer that he was
3 experiencing chest pain and having trouble standing and walking. (*Id.*) Two other
4 correctional officers transported Plaintiff to the medical complex in a wheelchair. (*Id.*)
5 Once there, his symptoms continued to worsen, and he lost consciousness several times.
6 (*Id.*) Plaintiff told Nurse Mcatee that he had ingested medication in order to take his life
7 “due to depression and not receiving adequate mental health care.” (*Id.*) Plaintiff’s blood
8 pressure readings were 161/95, 190/105, and 192/110, and his pulse was 62 beats per
9 minute. (*Id.*) Nurse Mcatee summoned the on-call provider, Defendant Tucker, but Tucker
10 “failed to provide [Plaintiff] immediate emergency treatment for [his] drug overdose by
11 not given [sic] the authorization to call 911, transport [Plaintiff] to a hospital by
12 ambulance.” (*Id.* at 6.) Instead, he “waited for a manifest emergency to become more
13 serious, even causing death.” (*Id.*) As a physician’s assistant, Tucker was allegedly aware
14 that the failure to pump Plaintiff’s stomach or administer charcoal would allow the
15 medications Plaintiff had taken to be completely absorbed into his bloodstream. (*Id.*) “[A]
16 minimally competent professional would not have treated” Plaintiff as Tucker did, because
17 Plaintiff’s “unstable vital signs” demonstrated that “[o]bservation only was [an]
18 inappropriate course of action.” (*Id.*)

19 Plaintiff claims that Tucker harbored “serious animosity” toward Plaintiff because
20 Tucker had been named as a defendant in one of Plaintiff’s prior lawsuits, *Benge v. Ryan*,
21 14-0402-PHX-DGC (SPL). (*Id.* at 7.) Tucker’s treatment of Plaintiff therefore constituted
22 a “serious conflict of interest,” according to Plaintiff. (*Id.*) Plaintiff also claims that
23 Tucker’s treatment decisions were motivated by a “financial incentive” because his
24 employment would be terminated if he referred a patient to the hospital. (*Id.*) According
25 to Plaintiff, Corizon policy dictates that prisoners only be sent to the hospital if they are
26 “on the verge of imminent death.” (*Id.*) Any medical expense for a prisoner at ASPC-
27 Lewis was viewed as unnecessary, and “‘elective’ hospital transfers” would be denied even
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Case Management/Electronic Case Filing system.

1 where a prisoner was experiencing “symptoms of extreme medical distress.” (*Id.* at 8-9.)
2 Such policies prevented Plaintiff from receiving emergency care from an outside hospital
3 and allowed Defendant Tucker—an “uncaring incompetent[]” with a “sword of termination
4 looming above him”—to disregard an excessive risk to Plaintiff’s health or safety. (*Id.*)
5 Lastly, Plaintiff claims that Defendant Tucker was a final policymaker for Corizon and
6 that, as a physician assistant, he was required by Arizona law to be supervised by a medical
7 doctor. (*Id.* at 9.)

8 As a result of the foregoing conduct, Plaintiff allegedly suffered vomiting, pain,
9 physical injury, post-traumatic stress disorder, depression, fear, emotional distress, anxiety,
10 nervousness, hopelessness, trauma, and “paranoid nightmares” and was forced to commit
11 himself to a psychiatric hospital. (*Id.* at 5, 7-8.)

12 In **Count Two**, Plaintiff alleges that he was denied adequate mental health care by
13 Defendants Corizon, Ryan, Pratt, Rawa, Bertel, and Mitchell, in violation of the Eighth
14 Amendment. (*Id.* at 10.) According to the Complaint, Defendant Rawa had a series of
15 “cursory” appointments with Plaintiff in February 2014. (*Id.* at 12.) At one of these
16 appointments, Rawa advised Plaintiff that he “did not qualify” for talk therapy with Rawa.
17 (*Id.*) At another, Rawa failed to take Plaintiff off a particular medication (Tegretol) when
18 laboratory tests indicated that Plaintiff had elevated sodium and chloride levels. (*Id.*) On
19 another occasion, Rawa “failed to act to [Plaintiff’s] risk of suicide” when Plaintiff
20 “advise[d] him of [Plaintiff’s] thoughts of suicide.” (*Id.*) In addition, Rawa allegedly
21 allowed Plaintiff to remain on older medications that were not effective. (*Id.* at 12.)

22 After witnessing his friend’s murder on March 17, 2014, Plaintiff submitted
23 multiple Health Needs Requests (HNRs) requesting talk therapy “as [he] wanted to kill
24 [him]self.” (*Id.* at 14-15.) Plaintiff “made several suicide gestures to no avail.” (*Id.* at 15.)
25 On March 26, 2014, he submitted an HNR seeking “more than a ‘cursory’ interview” with
26 Defendant Rawa and stating that he needed grief counseling because he had recently
27 witnessed a friend’s murder. (*Id.* at 13.) “Upon in formation and belief,” Rawa refused to
28 see Plaintiff because an ADC/Corizon policy prohibited him from providing grief

1 counseling or talk therapy. (*Id.*)

2 On May 29, 2014, Plaintiff submitted an HNR to Defendant Bertel in which he
3 requested an appointment with “a licensed psychiatric provider.” (*Id.*) On June 3, 2014,
4 Bertel responded, stating that Plaintiff “would see the ‘yard provider,’ [h]e refused to
5 provide grief or talk therapy due to a[n] ADC policy.”³ (*Id.*) According to Plaintiff, this
6 was a “breach[.]” of Bertel’s duty of care owed to him under ADC’s contract with Corizon.
7 (*Id.* at 13-14.) Plaintiff also notes that, under Arizona law, “a licensed psychologist cannot
8 write RX’s for medications, only provide talk therapy.” (*Id.* at 13.)

9 As a result of Rawa and Bertel’s conduct and ADC/Corizon policies, customs, and
10 practices, Plaintiff was forced to see “unqualify[ied] ‘Psych Associates’ [who] served as
11 gatekeepers to mental health care.” (*Id.* at 14.) One of these Psych Associates, Defendant
12 Mitchell, was allowed to make assessments and diagnoses and act as a gatekeeper and final
13 policymaker without any supervision” (*Id.*) At an April 17, 2014 appointment with
14 Defendant Mitchell, Plaintiff “could not stop crying.” (*Id.*) He told Mitchell that he no
15 longer wanted to live. (*Id.*) Mitchell disregarded Plaintiff’s heightened suicide risk, telling
16 Plaintiff to “pray and keep [his] faith” but failing to place him on suicide watch. (*Id.*)
17 Hours later, Plaintiff attempted suicide. (*Id.*)

18 Corizon, Pratt, and Ryan’s policy, practice, and custom of employing an insufficient
19 number of mental health care staffers and providing older, ineffective mental health
20 medications were the “moving force” behind Rawa, Bertel, and Mitchell’s conduct and
21 Plaintiff’s April 17, 2014 suicide attempt. (*Id.* at 10-11.) Plaintiff also claims that
22 Defendants Corizon, Ryan, and Pratt “were aware of widespread and systematic abuse of
23 inmates,” that Corizon has a policy of providing inadequate care to inmates that is driven
24 by “financial incentive/cost/profit,” and that Ryan and Pratt’s “recalcitrance flows from
25 their decision to privatize health care in order to save money.” (*Id.* at 11.)

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28 ³ It is not clear whether Plaintiff was refused grief or talk therapy by Defendant
Bertel or the yard provider.

1 As a result of Defendants' conduct, Plaintiff attempted suicide; suffered pain,
2 physical injury, mental and emotional sickness, post-traumatic stress disorder, and
3 depression; and was denied the right to "enjoy [his] life to the fullest extent." (*Id.* at 10,
4 16.)

5 In **Count Three**, Plaintiff alleges that he was denied reentry transition services, in
6 violation of the Eighth Amendment and the Fourteenth Amendment's Equal Protection
7 Clause. (*Id.* at 17.) Plaintiff, who had "been in ADC prison for almost 20 years for a non-
8 violent crime," had requested such services "countless times" over a two-year period by
9 filing HNRs, and Ryan, Pratt, and Corizon were made aware of his requests through inmate
10 letters, grievances, and grievance appeals. (*Id.*) He failed to receive any transition services,
11 however, because Corizon had a policy, practice, or custom of "having unqualified mental
12 health staff serv[e] as gatekeepers to mental health care." (*Id.*) Plaintiff claims that he was
13 often seen by "lower-level psychology associates" like Defendant Mitchell, who told
14 Plaintiff that she lacked any training in reentry transition services. (*Id.*) Mitchell's
15 supervisor, Defendant Bertel, refused to see Plaintiff, as set forth in Count Two. (*Id.*)
16 According to Plaintiff, "AZ Law (A.R.S.) requires reentry services by Director Ryan to a
17 person who requested such services countless times, especially after being in prison for
18 almost 20 years." (*Id.*)

19 Plaintiff claims that by denying him transition services, Defendants "acted with an
20 intent or purpose to discriminate against him based upon his membership in protected class
21 *Parsons v. Ryan*." (*Id.*) He also claims that he was treated differently from other prisoners
22 and that there was no rational basis for the disparate treatment. (*Id.*) As a result, Plaintiff
23 had his apartment broken into twice; had his new car, computer, cell phones, bicycle, and
24 medications stolen; suffered pain, anxiety, post-traumatic stress disorder, mental trauma,
25 depression, hallucinations, hot flashes, and suicidal tendencies; and was ultimately forced
26 to commit himself to a mental health facility. (*Id.*)

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1 In **Count Four**, Plaintiff claims that his rights under the ADA and the Eighth
2 Amendment⁴ were violated by Defendants Rawa, Bertel, Mitchell, Corizon, and Pratt when
3 they failed to accommodate his disability by denying him placement in a “more appropriate
4 facility” that, apparently, would have afforded him increased access to mental health care.
5 (*Id.* at 18.) Defendant Mitchell allegedly noted that Plaintiff’s treatment notes reflected his
6 prior request to transfer to ASPC-Phoenix. (*Id.*) In addition, Plaintiff wrote Defendants
7 Bertel and Pratt several inmate letters notifying them of his request. (*Id.*) Plaintiff
8 allegedly advised all Defendants that he was not receiving adequate mental health care at
9 ASPC-Lewis, and he claims that transfer to a mental health facility would have been a
10 “reasonable accommodation.” (*Id.*) According to Plaintiff, he is “classif[ied] as ADA
11 within ADC,” “was qualified to receive the benefits of services, programs, activities,” and
12 was “discriminated against, excluded, denied these benefits, service, programs, activities”
13 as a result of his disability. (*Id.*)

14 Plaintiff further claims that Defendants “had a policy, custom, and practice of
15 turning a blind eye on prisoners['] mental health care[] and intervention.” (*Id.* at 19.) In
16 addition, Defendants Rawa, Bertel, and Pratt allegedly had a supervisory duty to investigate
17 or override decisions of medical staff because they were medical professionals with
18 independent experience in a particular area of medicine. (*Id.*) Corizon, for its part,
19 allegedly failed to centrally coordinate medical services for prisoners, ignoring an ADC
20 health care directive that required each facility to provide comprehensive, planned care that
21 was organized and consistent across facility lines. (*Id.*) As a result, Defendant Mitchell,
22 who was responsible for coordinating Plaintiff’s overall medical care, never had Plaintiff’s
23 medical file “in front of her to review past information from previous health care providers
24 and to understand the clear scope of [his] mental health history; i.e., previous suicide
25 attempt, previous suicidal threats or gestures.” (*Id.* at 20.) According to Plaintiff, Corizon

27 ⁴ Although Plaintiff also appears to cite the Due Process Clause of the Fourteenth
28 Amendment, that provision only applies to conditions-of-confinement claims asserted by
pretrial detainees. *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Accordingly, the
Court does not construe Count Four as a due process claim.

1 and Pratt “had knowledge of the problem caused by a complete lack of coordinated care,”
2 but they failed to act, and were deliberately indifferent to Plaintiff’s confinement in a
3 facility that could not meet his mental health care needs. (*Id.*) As a result of Defendants’
4 conduct, Plaintiff allegedly suffered emotional distress, post-traumatic stress disorder, a
5 suicide attempt, and physical injury. (*Id.* at 17.) In addition, he was denied his right to
6 enjoy his life to the fullest extent and was forced to commit himself to a hospital for
7 depression. (*Id.*)

8 **V. Discussion**

9 **A. Counts One and Two**

10 **1. Statute of Limitations**

11 In § 1983 actions, the applicable statute of limitations is the forum state’s statute of
12 limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 266, 274-76
13 (1985); *Vaughan v. Grijalva*, 927 F.2d 476, 478 (9th Cir. 1991). The Arizona statute of
14 limitations for personal injury actions is two years. *See* Ariz. Rev. Stat. § 12-542(1);
15 *Madden-Tyler v. Maricopa County*, 943 P.2d 822, 824 (Ariz. Ct. App. 1997); *Vaughan*,
16 927 F.2d at 478. The Court must also apply any state law rules for tolling to § 1983 actions.
17 *Hardin v. Straub*, 490 U.S. 536, 544 (1989); *Johnson v. California*, 207 F.3d 650, 653 (9th
18 Cir. 2000); *TwoRivers*, 174 F.3d 987, 992 (1999).

19 While the statute of limitations and tolling provisions are borrowed from state law,
20 federal law continues to govern when a § 1983 claim accrues. *Wallace v. Kato*, 549 U.S.
21 384, 388 (2007); *TwoRivers*, 174 F.3d at 991. Under federal law, a claim accrues “when
22 the plaintiff knows or has reason to know of the injury which is the basis of the action.”
23 *TwoRivers*, 174 F.3d at 991; *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996).

24 Although Plaintiff’s claim accrued on April 17, 2014, when his injury occurred, he
25 did not file his Complaint until July 25, 2018—more than four years later.⁵ Thus, absent

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27 ⁵ For purposes of this analysis, the Court refers to the date on which the Complaint
28 was signed. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (under the “mailbox rule,” a
document is deemed “filed” when it is delivered by a prisoner to a prison official for
mailing); *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009) (applying the mailbox
rule to a § 1983 complaint filed by a pro se prisoner). In the absence of other evidence,

1 some basis for tolling, Plaintiff's claim is barred by the applicable statute of limitations.

2 Plaintiff argues that the statute of limitations was tolled during the pendency of
3 another federal case in which he raised the same claim, *Benge v. Ryan*, CV 16-00914-PHX-
4 DGC (BSB). CV 16-00914 was filed on March 31, 2016, and was dismissed for lack of
5 prosecution on November 4, 2016. (Docs. 1, 16 in CV 16-00914.) Arizona's savings
6 statute provides, in relevant part,

7 If an action timely commenced is terminated by abatement, voluntary
8 dismissal by order of the court or dismissal for lack of prosecution, the court
9 in its discretion may provide a period for commencement of a new action for
10 the same cause, although the time otherwise limited for commencement has
11 expired. Such period shall not exceed six months from the date of
12 termination.

13 Ariz. Rev. Stat. § 12-504(A); *see also Albano v. Shea Homes Ltd. P'ship*, 128, 254 P.3d
14 360, 367 (2011)) (discussing application of A.R.S. § 12-504(A) to federal claims). Thus,
15 assuming Plaintiff is entitled to tolling under Arizona's savings statute, his claims are
16 nevertheless untimely. Under Arizona Revised Statute 12-504(A), Plaintiff had until May
17 4, 2017, to commence a new action. As noted above, this case was not filed until July 25,
18 2018. Accordingly, Counts One and Two are barred by the statute of limitations.

19 **2. Failure to State a Claim**

20 Even if Counts One and Two are not barred by the statute of limitations, they
21 nevertheless fail to state a claim. Not every claim by a prisoner relating to inadequate
22 medical treatment states a violation of the Eighth Amendment. To state a § 1983 medical
23 claim, a plaintiff must show (1) a "serious medical need" by demonstrating that failure to
24 treat the condition could result in further significant injury or the unnecessary and wanton
25 infliction of pain and (2) the defendant's response was deliberately indifferent. *Jett v.*
Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).

26 "Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d
27 1051, 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both
28 courts will presume that a document was given to prison authorities for mailing on the day
it was signed. *Roberts v. Marshall*, 627 F.3d 768, 770 n.1 (9th Cir. 2010).

1 know of and disregard an excessive risk to inmate health; “the official must both be aware
2 of facts from which the inference could be drawn that a substantial risk of serious harm
3 exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
4 Deliberate indifference in the medical context may be shown by a purposeful act or failure
5 to respond to a prisoner’s pain or possible medical need and harm caused by the
6 indifference. *Jett*, 439 F.3d at 1096. Deliberate indifference may also be shown when a
7 prison official intentionally denies, delays, or interferes with medical treatment or by the
8 way prison doctors respond to the prisoner’s medical needs. *Estelle v. Gamble*, 429 U.S.
9 97, 104-05 (1976); *Jett*, 439 F.3d at 1096.

10 Deliberate indifference is a higher standard than negligence or lack of ordinary due
11 care for the prisoner’s safety. *Farmer*, 511 U.S. at 835. “Neither negligence nor gross
12 negligence will constitute deliberate indifference.” *Clement v. Cal. Dep’t of Corr.*, 220 F.
13 Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*, 622 F.2d 458,
14 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or “medical malpractice”
15 do not support a claim under § 1983). “A difference of opinion does not amount to
16 deliberate indifference to [a plaintiff’s] serious medical needs.” *Sanchez v. Vild*, 891 F.2d
17 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to
18 state a claim against prison officials for deliberate indifference. *See Shapley v. Nevada Bd.*
19 *of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be
20 substantial. The action must rise to a level of “unnecessary and wanton infliction of pain.”
21 *Estelle*, 429 U.S. at 105.

22 Plaintiff has failed to state a claim for deliberately indifferent medical care in Count
23 One. Plaintiff’s allegations are too vague and conclusory to state a claim under the Eighth
24 Amendment. Although Plaintiff alleges that Defendant Tucker failed to send him to a
25 hospital, pump his stomach, or administer charcoal, he does not allege any *facts* to show
26 that the treatment Tucker did provide—observation at the prison’s medical unit—
27 constituted deliberate indifference. While Plaintiff may disagree with Defendant Tucker’s
28 decision to monitor Plaintiff at the prison, at most, this decision was negligent.

1 Accordingly, Plaintiff has failed to state a claim against Tucker or Corizon for deliberately
2 indifferent medical care.

3 Plaintiff's claims in Count Two are similarly deficient. Plaintiff does not allege that
4 he was refused treatment by Defendants Rawa and Bertel, rather he claims that he did not
5 receive the type of treatment he wanted—talk therapy—from these Defendants. However,
6 it appears that Plaintiff received “talk therapy” from other individuals, and Plaintiff has not
7 alleged sufficient facts to show that the provision of talk therapy by a Psych Associate
8 constituted deliberate indifference to a serious medical need. To the extent Plaintiff claims
9 that Rawa failed monitor “act on” his risk of suicide, or monitor “dangerous levels of
10 ‘Tegretol,” his allegations are too vague and conclusory to state a claim. Plaintiff's
11 allegation that Defendant Mitchell failed to respond appropriately to his suicidal gestures
12 is, likewise, lacking sufficient factual support. Accordingly, Plaintiff has failed to
13 adequately allege that he received deliberately indifferent care, and Count Two will be
14 dismissed accordingly.

15 **B. Count Three**

16 **1. Equal Protection**

17 Generally, “[t]o state a claim . . . for a violation of the Equal Protection Clause . . .
18 [,] a plaintiff must show that the defendants acted with an intent or purpose to discriminate
19 against the plaintiff based upon membership in a protected class.” *Barren v. Harrington*,
20 152 F.3d 1193, 1194 (9th Cir. 1998). Plaintiff has not alleged that he is a member of a
21 protected class for purposes of the Equal Protection Clause; the class of inmates identified
22 as a plaintiff in *Parsons v. Ryan* has not been recognized as a protected class for such
23 purposes.

24 The United States Supreme Court has also recognized “successful equal protection
25 claims brought by a ‘class of one,’ where the plaintiff alleges that [he] has been
26 intentionally treated differently from others similarly situated and that there is no rational
27 basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564
28 (2000); *see also SeaRiver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th

1 Cir. 2002). Even under this standard, Plaintiff has failed to state a claim. He does not
2 allege any facts showing that he was treated differently than other similarly situated
3 individuals and that there was no rational basis for treating him differently.

4 **2. Eighth Amendment**

5 To state an Eighth Amendment conditions-of-confinement claim, plaintiffs must
6 meet a two-part test. “First, the alleged constitutional deprivation must be, objectively,
7 sufficiently serious” such that the “official’s act or omission must result in the denial of the
8 minimal civilized measure of life’s necessities.” *Farmer*, 511 U.S. at 834 (internal
9 quotations omitted). Second, the prison official must have a “sufficiently culpable state of
10 mind,” i.e., he must act with “deliberate indifference to inmate health or safety.” *Id.*
11 (internal quotations omitted). As noted in connection with Counts One and Two, deliberate
12 indifference is a higher standard than negligence or lack of ordinary due care for the
13 prisoner’s safety. *Id.* at 835. In defining “deliberate indifference,” the Supreme Court has
14 imposed a subjective test: “the official must both be aware of facts from which the
15 inference could be drawn that a substantial risk of serious harm exists, and he must also
16 draw the inference.” *Id.* at 837.

17 The Ninth Circuit has made it clear that the deprivation of educational or vocational
18 programming does not amount to the infliction of pain. *Hoptowit v. Ray*, 682 F.2d 1237,
19 1254-55 (9th Cir. 1982) (citing *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981)).
20 Accordingly, the denial of reentry transition services does not give rise to a claim under
21 the Eighth Amendment. Count Three will therefore be dismissed.

22 **C. Count Four**

23 **1. ADA**

24 Under Title II of the ADA, “no qualified individual with a disability shall, by reason
25 of such disability, be excluded from participation in or be denied the benefits of the
26 services, programs, or activities of a public entity, or be subjected to discrimination by any
27 such entity.” 42 U.S.C. § 12132. To state an ADA claim, a plaintiff must allege that:
28

1 (1) he is an individual with a disability; (2) he is otherwise qualified to
2 participate in or receive the benefit of some public entity's services,
3 programs, or activities; (3) he was either excluded from participation in or
4 denied the benefits of the public entity's services, programs, or activities, or
5 was otherwise discriminated against by the public entity; and (4) such
6 exclusion, denial of benefits, or discrimination was by reason of [his]
7 disability.

8 *Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1021 (9th Cir. 2010) (quoting *McGary v.*
9 *City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004)). A plaintiff must allege facts to
10 support that he has an impairment that substantially limits one or more of his "major life
11 activities." 42 U.S.C. § 12102(1)(A). "Major life activities" include "functions such as
12 caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking,
13 standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading,
14 concentrating, thinking, communicating, interacting with others, and working[.]" 29
15 C.F.R. § 1630.2(i).

16 Plaintiff's allegations regarding his disability are too vague and conclusory to state
17 a claim under the ADA. Plaintiff does not allege any facts to show that his depression
18 substantially limited one or more of his major life activities. In addition, he has failed to
19 allege that he was excluded from participation in or denied the benefit of a service,
20 program, or activity *because of* his disability. Instead, he appears to be complaining of
21 inadequate treatment *for* a disability—a claim that is not cognizable under the ADA.
22 *Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1022 (9th Cir. 2010) ("The ADA prohibits
23 discrimination because of disability, not inadequate treatment for disability." (citing *Bryant*
24 *v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996))). Accordingly, Plaintiff has failed to state an
25 ADA claim.

26 **2. Medical Care**

27 Plaintiff does not allege sufficient facts to show that the failure to transfer him to
28 ASPC-Phoenix constituted deliberate indifference to a serious medical need, and he had
no independent constitutional right to confinement in a particular facility. *Meachum v.*
Fano, 427 U.S. 215, 225 (1976); *Rizzo v. Dawson*, 778 F.2d 527, 530-31 (9th Cir. 1985).

1 Insofar as Plaintiff alleges that his Eighth Amendment rights were violated by Defendant
2 Mitchell's failure to provide comprehensive treatment, this claim appears to be duplicative
3 of the time-barred claim asserted in Count Two and is, in any event, too vague and
4 conclusory to satisfy Rule 8 of the Federal Rules of Civil Procedure. Accordingly, Plaintiff
5 has failed to state a claim in Count Four, and this count will be dismissed.

6 **VI. Dismissal Without Leave to Amend**

7 Because Plaintiff has failed to state a claim in his Second Amended Complaint, the
8 Court will dismiss his Second Amended Complaint. "Leave to amend need not be given
9 if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Express,*
10 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court's discretion to deny leave to amend is
11 particularly broad where Plaintiff has previously been permitted to amend his complaint.
12 *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).
13 Repeated failure to cure deficiencies is one of the factors to be considered in deciding
14 whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538.

15 Plaintiff has made three efforts at crafting a viable complaint and appears unable to
16 do so despite specific instructions from the Court. The Court finds that further
17 opportunities to amend would be futile. Therefore, the Court, in its discretion, will dismiss
18 Plaintiff's Second Amended Complaint without leave to amend.

19 **IT IS ORDERED:**

20 (1) Plaintiff's Motion for Reconsideration (Doc. 27) is **granted**. The Clerk of
21 Court must **vacate** the December 17, 2019 Judgment (Doc. 26).

22 (2) Plaintiff's Application to Proceed In District Court Without Prepaying Fees
23 or Costs (Doc. 24) is **granted**.

24 (3) Plaintiff's Second Amended Complaint (Doc. 17) and this action are
25 **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment
26 accordingly.

27

28

(4) The Clerk of Court must make an entry on the docket stating that the dismissal for failure to state a claim may count as a “strike” under 28 U.S.C. § 1915(g).

Dated this 6th day of February, 2020.

Michael T. Liburdi

Michael T. Liburdi
United States District Judge